IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. ZOE ANN MARSHALL, Respondent.	No. 37087-5-II UNPUBLISHED OPINION

Van Deren, C.J. — Zoe Ann Marshall challenges the sufficiency of an affidavit of probable cause based on a search of a third person's vehicle yielding evidence police used to obtain a search warrant.[1] Marshall also challenges the sufficiency of the evidence to prove that she was an accomplice in the crime of unlawful manufacture of methamphetamine and to support a finding

[1] At oral argument, Marshall challenged the legality of the initial vehicle search under the Supreme Court's recent opinion in *Arizona v. Gant*, __ U.S. __, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009) and argued that the evidence used to obtain the search warrant for the house was "fruit of the poisonous tree," i.e., the illegal vehicle search. In supplemental briefing, Marshall conceded that she lacks standing to challenge the vehicle search because she was not in the vehicle nor did she have any expectation of privacy or property interest in the vehicle.

Fourth Amendment rights are personal and cannot be asserted vicariously. *Alderman v. United States,* 394 U.S. 165, 171-72, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969); *see, e.g., State v. Smith*, 104 Wn.2d 497, 707 P.2d 1306 (1985). To establish standing to challenge a search or to suppress evidence obtained as "fruit of the poisonous tree," the challenger must show that the search or seizure violated their own expectation of privacy or property interest. *Rakas v. Illinois*, 439 U.S. 128, 137-38, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978); *Wong Sun*, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

she was armed during the commission of the crime. She further challenges as hearsay the testimony of one officer. We affirm her conviction.

FACTS

On February 20, 2006, Sumner Police Officer Joseph Boulay pulled over a 1990 Mazda and eventually arrested the driver, Monique Shiels, for driving with her license suspended. While conducting a search of the vehicle incident to arrest, Boulay located pieces of identification in different names and checks and receipts that caused him to suspect that Shiels was engaged in identity theft.

Shiels was booked for the original driving offense, one count of identity theft, and three counts of financial fraud. Shiels provided her home address at booking as 9024 216th Street Court East, Graham, Washington. The Department of Licensing (DOL) also listed this address for Shiels. The Pierce County Assessor listed Marilyn McCarrell as the owner of the house at the 216th Street address.

When Boulay called McCarrell, she confirmed that she owned the property but that she did not live at the address. McCarrell told Boulay that her son, Ronald Brown, lived there and "as far as she kn[e]w[], nobody else live[d] there." Clerk's Papers (CP) at 209. DOL records showed the 216th Street address as Brown's address.

One piece of identification seized from Shiels's vehicle had Sheils's photograph with the name "Dawn Lorraine Hewitt [date of birth] 05-19-84." CP at 208. There was also a document dated February 6, 2006, stating that a credit card in the name of Dawn Hewitt had been mailed to the 216th Street address. Boulay located a telephone listing for Dawn Hewitt and called her. Hewitt told Boulay that she did not live on 216th Street and that she had recently been contacted

by a bank asking about a credit card linked to her and an unknown person named Kelly Hilton.[2]

Hewitt followed up with various banks and reported to Boulay that the total value of fraudulent checks and credit card charges in her name was over $2,000. Among other items Boulay placed into evidence after the vehicle search were a receipt for a February 17, 2006, purchase at Fred Meyer using a credit card with the last four digits matching a fraudulent account under Hewitt's name and two charges at Macy's made the same day with cards linked to Hewitt.

The affidavit in support of the search warrant for the 216th Street property was based on the evidence seized from Shiels's vehicle and Boulay's subsequent investigation. The affidavit sought permission to search for mail addressed to the identified victims of identity theft, including Hewitt, as well as credit cards, debit cards, identification documents, checks, bank statements, other negotiable instruments, computers and similar devices, personal communications, lamination equipment, and other evidence of identity theft.

A superior court judge issued a warrant on February 23, 2006, which the police served on February 24. Both Brown and Marshall were in the residence when the search occurred. During the search under the initial warrant, police officers saw evidence of methamphetamine manufacture in plain view. The officers obtained a second warrant to search for evidence of drug manufacture.[3] Under that warrant, the officers discovered a large number of chemicals used to manufacture methamphetamine. Officers also located two loaded firearms in a storage room accessed off the main hallway.

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[2] Boulay found checks, credit cards, and pieces of identification "in the name of Kelly Hilton," among other names, in Shiels's vehicle. CP at 208.

[3] Marshall does not challenge the issuance of the warrant relating to drug manufacture and it is not an issue on appeal.

Pierce County Deputy Sheriff Byron Brockway testified at trial that he saw a black purse in the living room. In it, he found a small notebook and an identification card for Marshall. The notebook contained a recipe for methamphetamine manufacture. It also contained a reference to "fish food hatchery." Report of Proceedings (RP) (Aug. 29, 2007) at 262. In addition, Brockway found "a duffle bag with some women's clothing" that also contained a plastic bag with baking soda. RP (Aug. 28, 2007) at 115.

The State charged Marshall with unlawful manufacture of a controlled substance with a school bus route enhancement (count I). The State subsequently amended the information to add a count of unlawful possession of a controlled substance with intent to deliver with the aggravating circumstance that Marshall was under community custody at the time of the commission of the crime (count II). It also added two firearm enhancements[4] to count I. At trial, the trial court dismissed the intent to deliver portion of the possession charges.

Marshall challenged the validity of the search warrant for the 216th Street address based on evidence found during the search of Shiels's vehicle, arguing that the search warrant lacked probable cause. Specifically, she maintained that the affidavit did not demonstrate a sufficient nexus between the suspected criminal activity of identity theft and the house they sought to search. Following a CR 3.6 hearing, the trial court upheld the search warrant and the subsequent search that led to Marshall's arrest.

Brown testified in Marshall's defense. He stated that he had manufactured the methamphetamine on his own. He also mentioned that he had tried to extract ephedrine, a key ingredient of methamphetamine manufacturing, from fish food. In rebuttal, the State recalled

[4] RCW 9.94A.533(3).

Boulay and asked him about statements Brown made to him at the time of arrest. Boulay stated that Brown told him that some "material in the buckets in the closet was leftover because some person, who he would not identify, came to his residence and attempted to extract what he called the 'E.'" Boulay understood "E" to mean ephedrine. RP (Sept. 5, 2007) at 14-15. The trial court allowed this testimony over Marshall's hearsay objection.

The jury found Marshall guilty of unlawful manufacture of methamphetamine and found that she or an accomplice was armed and within 1,000 feet of a school bus route stop at the time of the offense. The jury found Marshall not guilty on count II, unlawful possession of a controlled substance with intent to deliver. The trial court sentenced her to 120 months' confinement.

ANALYSIS

I. The Initial Search Warrant Affidavit

A. Standard of Review

Marshall first argues that the affidavit of probable cause supporting the search warrant contained insufficient facts to establish a nexus between the crimes being investigated and the house. *State v. Freeman*, 47 Wn. App. 870, 737 P.2d 704 (1987) summarizes the standard of review applied to a challenge to a search warrant:

> This court reviews the validity of a search warrant for abuse of discretion, giving great deference to the magistrate's determination of probable cause. In interpreting a search warrant affidavit, reviewing courts are to determine whether an ordinary person reading the affidavit would understand that a criminal violation existed and was continuing at the time of the search warrant application. Courts should evaluate the affidavit in a commonsensical, rather than hypertechnical, manner. Doubts should be resolved in favor of the warrant's validity.

Freeman, 47 Wn. App. at 873 (citations omitted). The State notes that, on appeal, Marshall has

not challenged findings of fact associated with the issuance of the warrant. Generally, "in reviewing findings of fact entered following a motion to suppress, we will review only those facts to which error has been assigned." *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

B. Nexus

Marshall contends that the search warrant lacked a sufficient nexus between the suspected identity fraud and the 216th Street address. She argues that: (1) the property owner confirmed that Shiels did not live at the house; (2) it is improper to infer because criminals are or have been associated with an address, here, Brown and Shiels, that criminal activity is occurring at the address; and (3) speculation by a police officer cannot support the issuance of a search warrant.

Probable cause requires a "'nexus'" between a crime and the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). The nexus must be established by specific facts; an officer's "general conclusions" are insufficient. *Thein*, 138 Wn.2d at 145.

Here, the February 23, 2006, complaint for search warrant (affidavit) provides facts demonstrating a sufficient connection between the ongoing crime of identity theft and the 216th Street address. In relevant part, the affidavit states that Shiels's vehicle contained false identification in Dawn Hewitt's name; multiple credit cards, including one or more in Hewitt's name; a document dated February 6, 2006, stating that a credit card in Hewitt's name had been sent to the 216th Street address; multiple credit card receipts with Hewitt's name; and other checks and documents in Hewitt's name.

On subsequent investigation, Hewitt confirmed that she had been the victim of multiple acts of identity theft. She added that "recently" a check was cashed on one of her bank accounts. CP at 209. She also stated that two fraudulent credit card accounts in her name had unpaid

balances. In his investigation, Boulay discovered that purchases were made on two of Hewitt's false credit cards approximately one week before the date of the affidavit.

Further, Shiels provided the 216th Street address to the officer during booking and the address was listed in her DOL records. Marshall makes much of the fact that McCarrell was the listed property owner, not Shiels. But McCarrell stated that she herself did not reside at the address. She told the officer that Brown lived there and "as far as she kn[e]w[]," nobody else live[d] there." CP at 209. McCarrell's statements did not rule out Shiels's residence at the house, given that McCarrell admitted she did not live there

Even excluding the evidence of other false identification and checks in the vehicle and Sheils and Brown's extensive criminal histories, the search warrant was supported by facts showing that (1) at least one verified piece of false identification was created using the 216th Street address, (2) identity theft in Hewitt's name was ongoing, (3) Shiels listed the 216th Street address as her residence, and (4) McCarrell's statements could not conclusively rule out that Shiels resided at the address. These facts demonstrate that the affidavits contained sufficient facts to establish a nexus between the false identification and credit cards and the house at 216th Street *See State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007). We agree with the trial court that, based on the affidavit, "the common sense here is that you are not going to be committing identity theft . . . without some sort of an address . . . to receive mail . . . to establish the credit . . . . So a reasonable inference from that is there's going to be more . . . evidence of identity theft located in that residence." RP (Nov. 16, 2006) at 39. Consequently, the trial court did not abuse its discretion in denying Marshall's motion to suppress the evidence seized at the house.

II. Sufficiency of the Evidence

Marshall also argues that the evidence was insufficient to show that she was an accomplice to the methamphetamine manufacture. We disagree.

A. Standard of Review

When reviewing sufficiency issues, we view the evidence in the light most favorable to the State to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). And we defer to the trier of fact on any issue that involves "conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

B. Accomplice Liability

> A person is an accomplice of another person in the commission of a crime if:
> (a) With knowledge that it will promote or facilitate the commission of the crime, he
> (i) solicits, commands, encourages, or requests such other person to commit it; or
> (ii) aids or agrees to aid such other person in planning or committing it; or
> (b) His conduct is expressly declared by law to establish his complicity.

RCW 9A.08.020(3). Therefore, to find Marshall "guilty as an accomplice, the State had to show that [Marshall] aided [another] in his manufacturing endeavors." *State v. Gallagher*, 112 Wn. App. 601, 613, 51 P.3d 100 (2002). "Mere presence at the scene of a crime, even if coupled with

assent to it, is not sufficient to prove complicity. The State must prove that the defendant was ready to assist in the crime." *State v. Luna*, 71 Wn. App. 755, 759, 862 P.2d 620 (1993).

Marshall argues that her "mere presence" at the 216th Street address is insufficient to support her conviction as an accomplice to methamphetamine manufacture. Br. of Appellant at 19. Specifically, she maintains that "[t]he only evidence linking [her] to the manufacture of methamphetamine . . . are the facts that she was present at the residence when the search warrant was executed and one page of a notebook found in her purse had a description of a portion of the methamphetamine production process." Br. of Appellant at 20. She argues that this evidence is insufficient to support her conviction as an accomplice and that, "[a]t best, the State's evidence established that [she] was present at the scene of the manufacture of methamphetamine, knew it was occurring, and assented to it." Br. of Appellant at 20-21.

But Marshall's possessions at the residence and Brown's testimony that she had stayed there "once a week" for the past six months demonstrate that Marshall was more than a casual visitor to the residence. RP (Sept. 4, 2007) at 116. In addition, the notebook in her purse contained a detailed description of part of the manufacturing process and a reference to "fish food." RP (Aug. 29, 2007) at 262. A bag containing her belongings also held baking soda, which can be used in the manufacturing process. Officers discovered a bucket at the residence filled with commercial fish food and Brown stated that he had tried to use the fish food to manufacture methamphetamine.

Finally, Brown testified that he had tried to extract ephedrine from an additional chemical compound, Tri-Hist, found at the residence that another person brought to him. This and other chemicals also found in the house are used in treating horses and are generally available in tack

shops. At the time of her arrest, Marshall was employed to exercise horses at a farm.

Based on this record, interpreted in the light most favorable to the State, there was sufficient evidence to support the jury's conclusion that not only did Marshall know that Brown manufactured methamphetamine but she assisted him with the process. She stayed at the residence on a regular basis; she possessed a methamphetamine recipe and an ingredient, baking soda, used to make methamphetamine; the notebook in her purse referenced fish food, a possible source of ephedrine used in the manufacturing process, which was also present in the residence; and she had the ability to provide Brown with other ingredients containing ephedrine, such as Tri-Hist, which were also present in the residence.

C. Sufficiency of the Evidence that Marshall Was Armed

Marshall also challenges whether sufficient evidence exists to support a finding that she or Brown was armed when manufacturing methamphetamine. To be armed, a defendant must have "'a weapon easily accessible and readily available for offensive or defensive purposes.'" *State v. Schelin*, 147 Wn.2d 562, 567, 55 P.3d 632 (2002) (quoting *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993)). The State must also show a connection "between the weapons and the defendant and between the weapon and the crime." *Schelin*, 147 Wn.2d at 567-68.

In a continuing crime, such as drug manufacture, the required nexus is satisfied if the weapon is "'there to be used'"; it is not satisfied simply because a weapon is present. *State v. Neff*, 163 Wn.2d 453, 462, 181 P.3d 819 (2008) (quoting *State v. Gurske*, 155 Wn.2d 134, 138, 118 P.3d 333 (2005)). But, "[t]he defendant does not have to be armed at the moment of arrest to be armed for purposes of the firearms enhancement." *State v. O'Neal*, 159 Wn.2d 500, 504, 150 P.3d 1121 (2007). Marshall contends that the evidence was insufficient to show the required

connection between her or Brown and the weapons and between the weapons and the unlawful manufacture of methamphetamine.

Here, the evidence shows that police discovered a loaded black powder pistol and a loaded rifle in what was described as a "storage room." RP (Aug. 28, 2007) at 149. The room was accessed from the main hallway. An officer testified that the firearms appeared "ready to fire." RP (Sept. 4, 2007) at 18. One officer conducting the search admitted that the doors to rooms from the hallway may have been shut when he entered the residence but he did not testify to any locked doors. Brown, in contrast, testified that the guns were antiques and were kept in a locked room.

Taking the evidence in the light most favorable to the State, loaded weapons were present at the residence in a room accessible from the main hallway. In this circumstance, sufficient evidence supports the firearm sentencing enhancement. At least three cases with similar circumstances support this conclusion.

First, in *State v. Simonson*, 91 Wn. App. 874, 960 P.2d 955 (1998), we determined that a jury could infer from the presence of loaded guns at the site of an active methamphetamine manufacturing site that the weapons were intended to protect the manufacturing site:

> Taken in the light most favorable to the State, the evidence here shows that [the defendants] were committing a continuing offense, manufacturing methamphetamine, over a six-week period of time. During some or all of that time, they kept seven guns on the premises. It is reasonable to infer that not less than four were kept in a loaded condition . . . . It is also reasonable to infer that the purpose of so many loaded guns was to defend the manufacturing site in case it was attacked. We conclude that the evidence is sufficient to support the deadly weapon enhancement.

Simonson, 91 Wn. App. at 883.

Second, in *O'Neal*, our Supreme Court upheld a weapons enhancement where officers found a loaded gun propped in an open closet of the master bedroom and a loaded pistol under a mattress in a second bedroom of a house used to manufacture drugs. 159 Wn.2d at 505-06; *see also State v. O'Neal*, 126 Wn. App. 395, 404, 109 P.3d 429 (2005), *aff'd*, 159 Wn.2d 500 (2007).[5]

Finally, in *Neff*, our Supreme Court upheld the firearm enhancement where officers found two loaded pistols in a safe in a garage and a third pistol hanging in the rafters of the garage. 163 Wn.2d at 463-64. The enhancement applied even though no facts in the record supported that the defendant was in the garage at the time of the arrest. *Neff*, 163 Wn.2d at 464-65.

The circumstances in this case provide no reason to distinguish these cases; the evidence is sufficient to support the jury's finding that Brown and Marshall used the residence to manufacture methamphetamine and that they kept two loaded guns on the premises in an area accessible from the main part of the house.

III. Officer Boulay's Testimony

Finally, Marshall argues that the trial court abused its discretion in admitting hearsay evidence. ER 801(c); ER 802.[6] The State contends that the disputed testimony by Boulay impeached Brown's testimony regarding the use of fish food in the methamphetamine

[5] In contrast, in *Valdobinos*, cited by Marshall, our Supreme Court reversed an enhancement predicated on the presence of an unloaded rifle stored under a bed. 122 Wn.2d at 274, 282.

[6] ER 801(c) states: "Hearsay. 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

ER 802 states: "Hearsay is not admissible except as provided by these rules, by other court rules, or by statute."

manufacturing process. ER 607.[7]

A. Standard of Review

The trial court has broad discretion regarding the admissibility of evidence and we will not reverse absent manifest abuse of discretion. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001).

> Evidence offered to impeach is relevant only if (1) it tends to cast doubt on the credibility of the person being impeached, and (2) the credibility of the person being impeached is a fact of consequence to the action. The second of these elements is the question of who can be impeached. If a person's credibility is a fact of consequence to the action, the jury needs to assess it, and impeaching evidence may be helpful.

State v. Allen S., 98 Wn. App. 452, 459-60, 989 P.2d 1222 (1999).

Impeachment evidence, however, cannot be used to prove the truth of the previous inconsistent witness statement without violating the rule against the use of hearsay testimony. *See Salvidar v. Momah*, 145 Wn. App. 365, 400, 186 P.3d 1117 (2008). "Generally, hearsay is not admissible as evidence unless specifically permitted by the rules of evidence, by court rules, or by statute." *State v. Clinkenbeard*, 130 Wn. App. 552, 569, 123 P.3d 872 (2005).

B. The Contested Testimony

At trial, Brown testified that he had tried to manufacture methamphetamine and that nobody had assisted him. He acknowledged that he tried to extract ephedrine from fish food. The State asked him whether he recalled "telling the officer [at the time of the search] that someone else was attempting to [extract ephedrine]?" Brown responded "No, I don't. I told them that I was extracting it from fish food." The State then confirmed, "So you don't recall

[7] ER 607 states, "The credibility of a witness may be attacked by any party, including the party calling the witness."

telling them that some other person came there to do that?" Brown responded, "No, I don't." RP (Sept. 4, 2007) at 122.

The State recalled Boulay to testify about his questioning of Brown regarding the fish food. Over Marshall's hearsay objection, Boulay testified:

> I asked him about the items, and Mr. Brown said that the material in the buckets in the closet was leftover because some person, who he would not identify, came to his residence and attempted to extract what he called the "E," like the letter "E," which I understood to be ephedrine. Someone came to his house and tried to extract the "E" from fish food, according to Mr. Brown.

RP (Sept. 5, 2007) at 14-15.

In closing, the State mentioned the fish food testimony. It summarized Boulay's testimony and added, "[Brown] is giving inconsistent stories." RP (Sept. 5, 2007) at 88. Marshall did not object to these statements during the State's argument.

The State also discussed the horse-related chemicals that Brown admitted "somebody" brought to him. RP (Sept. 4, 2007) at 122. It then pointed out inconsistencies in his testimony, such as the fact that he denied that he had a significant relationship with Marshall at the time he manufactured drugs, and summarized:

> The inconsistencies in all of his testimony lead you to one conclusion, and that is that his story is not the truth. Why? Why is he up here testifying and telling you something that is other than the truth? The reason is to protect Zoe Marshall. The only reason to protect her is because she did aid him. If she did not aid him, he wouldn't have had to alter his story because he would have been able to tell you the truth.

RP (Sept. 5, 2007) at 90. The State also talked about the additional evidence, such as the recipe in Marshall's purse, that linked her to the manufacturing operation. Marshall did not object.

C. Purpose of the Statement

Marshall maintains that the State offered Boulay's testimony regarding Brown's out-of-court statements to prove that Brown worked with an accomplice and was, therefore, offered "for the truth of the matter asserted." Br. of Appellant at 29. She argues that the State's use of the testimony during closing demonstrates that the testimony violated ER 802. The State responds that Brown's previous statement was inconsistent with his trial testimony and could be used to impeach him.

Although the line between the substantive use of evidence and use of evidence for impeachment is often difficult to draw, this matter closely resembles *State v. Hancock*, 109 Wn.2d 760, 748 P.2d 611 (1988), in which our Supreme Court, faced with a similar issue, determined:

> The real problem with Detective Ostrander's testimony regarding statements made to him by [the defendant's wife] is that [the defendant's] alleged admission . . . may have been accepted as substantive rather than merely impeaching evidence, contrary to ER 802. However, while we acknowledge the potential difficulty a jury has in distinguishing between impeachment and substantive evidence, we do not conclude that the trial judge abused his discretion in allowing [the defendant's wife's] out-of-court statement into evidence. Taken as a whole, the statement was admissible under ER 607 to rebut the affirmative testimony [the defendant's wife] provided for the defense. Furthermore, if counsel wishes to restrict the jury's use of evidence it must request an appropriate limiting instruction. We note that no such limiting instruction was requested in this case.

Hancock, 109 Wn.2d at 766-67 (footnote omitted). Similarly, Boulay's testimony rebutted Brown's "affirmative testimony" that he was the only person involved in drug manufacture. *Hancock*, 109 Wn.2d at 767. And Marshall apparently did not request a limiting instruction.[8]

Consequently, because the testimony (1) tended "to cast doubt on the credibility of the person being impeached, and (2) the credibility of the person being impeached is a fact of consequence to the action," we hold that the trial court did not abuse its discretion when it

[8] Neither party states whether Marshall requested a limiting instruction. The written jury instructions do not contain a limiting instruction.

overruled Marshall's hearsay objection. *Allen S.*, 98 Wn. App. at 459-60.

Marshall further contends that Boulay's testimony was a trial irregularity that deprived her of a fair trial. We do not address this argument in detail because we conclude the testimony did not give rise to any error.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Penoyar, J.

Korsmo, J.